UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RUHI REIMER, Individual and on behalf of others similarly situated, Plaintiff,	:	Civil Action No. 1:23-cv-00683-MSN-JFA
v.	:	November 3, 2023 10:13 a.m.
MEDIGAP LIFE, LLC, Defendant.	:	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JOHN F. ANDERSON,
UNITED STATES MAGISTRATE JUDGE

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THE COURTROOM DEPUTY: Calling Civil Action Number 23-cv-683, *Reimer v. Medigap Life, LLC*.

MR. PORTER: Good morning, Your Honor. Gregory Porter of Bailey & Glasser, Virginia counsel for Mr. Reimer. With me is my partner, John Barrett, who will be presenting the argument for the plaintiff.

MR. BARNES: Good morning, Your Honor. Attison Barnes on behalf of Medigap. With me today is Ryan Watstein and Matt Keilson; and Ryan Watstein will be arguing today.

THE COURT: Well, I will tell you, I've read all the pleadings that the parties have filed in this matter. This is a serious matter, and I appreciate you being here, and I'll hear any argument that you want to add, but you don't have to do a whole lineup about the facts and circumstances. I'm pretty familiar with what they are and what's happened here.

So I guess I'll let, Mr. Watstein, you start off since it's your motion.

MR. WATSTEIN: Thank you, Your Honor.

So since I know you've read everything, I won't go through all the detail, but what I will say is that, you know, this is a putative class action in which we currently have eight or nine subpoenas for significant third-party information out. Our client has already incurred hundreds of thousands of dollars of expense in this case.

The plaintiff, the named plaintiff, who purports to be a

representative for the class, has admittedly thrown away the most critical piece of evidence in the entire case, a Windows computer, when a Windows computer was used to opt in to the lead in this case, where a consent is a complete defense to every single claim in this case. It's not -- this isn't a case where somebody deleted a few emails that might have been helpful to the defendant. It's a case where the computer, the device, that we believe was used to opt in to this lead that would give us a complete dispositive defense to the case and end all this class discovery was intentionally and admittedly destroyed by the plaintiff. And so we think it's just a textbook case of spoliation. And just to quickly go through the elements -- duty to preserve: Here, there was not just a duty to preserve because it was, obviously, critically relevant information to this case, but Mr. Reimer has filed over a dozen TCPA class actions from which he's made hundreds of thousands of dollars in individual -- not class -- settlements, and several of those cases were already filed at the time that he sent his initial demand letter in this case to Medigap, my client; and Medigap responded, We think there's no merit --

THE COURT: Well, he had a lawyer send the demand letter; is that right?

MR. WATSTEIN: Well, that's -- I mean, yes, a lawyer sent the demand letter, but Mr. Reimer contacted his lawyer and said, This is --

THE COURT: No, I'm just saying he was represented by counsel at the time that he sent the demand letter.

MR. WATSTEIN: Absolutely.

THE COURT: You know, the scenario -- and I don't know exactly; I haven't seen, at least in the record that I have, the initial letter that went to Medigap, but there is a response from Medigap to the lawyer, and that was back in April. These calls started happening in February, so this is within 60 days of when the calls started, right?

MR. WATSTEIN: That's correct. That's correct. There was a --

THE COURT: So you have a lawyer involved, and the lawyer starts communicating with Medigap, and Medigap then corresponds with him and says, We've got a consent form, you know, online, those kinds of things, the April 19th letter, right?

MR. WATSTEIN: That's correct, and Mr. Reimer conceded at deposition that he had read the letter from Medigap stating Medigap's position. But it wasn't just Medigap's position that he had opted in to this lead; at that point in time, Mr. Reimer already had, essentially, identical pending litigation against other parties that had said the exact same thing: We have an online opt-in from this individual -- often Rob K., who we now know has a phone number that is one digit off from Mr. Reimer's. And so that was the consistent story from everybody that Mr. Reimer either sued or sent a demand letter to. So while

there would be a duty to preserve just based on the fact that, clearly, a computer in a case involving an online opt-in is the most critical piece of evidence, but, here, you have other litigation where there's a consistent story coming from the defense side that we have an online opt-in; and that's case dispositive.

And it bears noting, too, an interesting fact here: The lawyers that represented Mr. Reimer at the time, after they received Medigap's responses, they declined to further represent Mr. Reimer.

THE COURT: And a year later, he files suit here?

MR. WATSTEIN: A year later, he files suit. We take his deposition -- well, we learned shortly before his deposition that the computer was gone, and --

THE COURT: That was in August?

MR. WATSTEIN: Correct. And there had been discussion -- we were on the cusp of spending about $25,000 to do an inspection of his phone, but he has an iPhone, and this was an opt-in through a Windows device. It would have been just a complete waste of money. We need the computer.

And I don't want to jump around too much, but I do want to note what probably is the most important item in my view, and that is that there is no other way to get the information that was on his computer. There's some argument that, Oh, well, what about sending a subpoena to his ISP, Verizon? The only thing

that a subpoena to Verizon could establish, number 1, if they followed their own published data retention schedules, is that information was deleted. Networking information was deleted long before this case was filed. But the only thing that Verizon could tell us is if -- it could only prove a positive: If Mr. Reimer was sitting at home connected to his Verizon internet connection and opted in. It could not tell us anything about whether he submitted that opt-in from his computer from any other location. I logged in to six networks in the last 24 hours -- airport, hotel, Starbucks, local coffee shop, office, home -- are we supposed to send a subpoena to every single ISP for every IP address in the entire country? The point is, there is no alternative to the evidence that was on his computer. Browsing history, cookies, networking logs that would show that he used a VPN -- which, by the way, we already have evidence of, circumstantial evidence of -- and so there's just no way to get the information.

So the prejudice to Medigap is significant. We are lacking the most critical piece of evidence in the case, and it's not just an individual plaintiff case; it's a putative class action where we're spending tons of money every week defending the case. We're in class discovery, and we're prejudiced and not able to defend against his individual claim, which we contend would end the case.

So going back to the elements, Your Honor, we talked about

duty to preserve, the fact that there was relevant information lost, the fact that plaintiff caused the loss -- that's not in dispute; he admits he threw away the computer. We talked about the fourth element, that there's no alternative for the lost information. And I would note that these points that I'm making and the points in our briefing, they are not disputed with evidence. So we put in a declaration from Jerry Cohen, who's a networking professional, and the plaintiffs had an expert, and they attached an expert report to their response, but it is not an expert report that goes to any of the points that are salient to this motion, like alternatives for the lost computer and whatnot. It was prepared before we even filed the spoliation motion. It doesn't have anything to do with it. Notably, they didn't go back to their expert, in opposing our spoliation motion, and say, Hey, can we get a declaration from you to support the attorney arguments we're making about, for example, subpoenaing Verizon, or sending out a bunch of third-party subpoenas to AWS, which houses the website that was opted into? So it's really -- our evidence is unrebutted. There's only attorney arguments. There are some statements by Mr. Reimer, who's not a computer expert. And on top of that, I mean, the case law is pretty clear that in proving the no alternative, it's a pretty low bar, no alternative for the evidence. And, here, it's not disputed that the computer is gone. There wasn't a copy made of it. It's not like other -- it's not like -- the way we

view this is a hybrid case. You have destruction of tangible physical evidence, the computer itself; and you also have destruction of the ESI that was on the computer. So it's different from these email cases where, Well, do we really want to punish the defendant because they had an automatic deletion policy on their email? It was probably unintentional. And you could go to another custodian who was copied on the emails to potentially get these same emails. No; it's gone. It's a physical device that's gone.

And then that brings us to the question of remedy --

THE COURT: Well, no, you have to get to intent --

MR. WATSTEIN: Well, okay --

THE COURT: -- intent to deprive another for use in the litigation.

MR. WATSTEIN: Right. And so are you traveling under Rule 37, Your Honor?

THE COURT: Yes.

MR. WATSTEIN: So we would contend a couple of things: Number 1, we satisfy Rule 37 -- and I will explain that in a minute -- but we don't need to satisfy Rule 37 because, again, it's not just an ESI case; he destroyed his computer. Like, if somebody were to have burned down an entire server warehouse, would we really have to travel under Rule 37? I would submit that the answer is no. But we do easily satisfy both prongs of Rule 37. There's two independent prongs, and I'll pull up the

rule here.

THE COURT: The prejudice one, I don't think we need to spend any time on. See intent to deprive.

MR. WATSTEIN: Yeah, and so -- right. So we think that -- the way that we read the rule upon finding a prejudice -- and I'll speak very briefly here, quickly here on this element -- [as said]: Upon finding prejudice, the Court may order measures no greater than necessary to cure the prejudice.

Here, our contention is, the only measure that could cure the prejudice is terminating sanctions, ending the case. And I want to make clear that if this were a case involving a deceased family member or a serious personal injury, maybe we wouldn't be taking that extreme of a position, but this is a statutory damages case where the plaintiff has conceded that, Well, the only thing that's at issue is some annoyance from a couple of phone calls. So it is different -- terminating sanctions in a case like this are much different than terminating sanctions in a case that has significant consequences for the party facing the sanctions.

So moving on, though, to the other prong, the intent to deprive, we think we've got significant evidence of that. We have a serial plaintiff who is very sophisticated. He's highly educated. As an example of how sophisticated the plaintiff is, he makes a good source of his income from financial arbitrage; in other words, exploiting the inefficiencies in an efficient

market. That takes some smarts. He's also involved in foreign arms transactions. Somebody who is that sophisticated would obviously know the significance of throwing away their computer, particularly when they had been told on numerous occasions by several different defendants that we believe you opted in and gave consent to this contact by submitting an online form from a computer. So while we don't have a recording of Mr. Reimer saying, you know, or a text message saying, I intentionally deleted this evidence to deprive the other side of the evidence, we can't think of a clearer case, absent that Perry Mason moment, just based on, you know, everything that I've already talked about, the fact that --

THE COURT: Well, he threw away the computer in early summer of 2022.

MR. WATSTEIN: Correct.

THE COURT: So help me put the pieces together as to why you think that that action taken in early summer of 2022 was taken as an intent to deprive a party of relevant information in litigation.

MR. WATSTEIN: Sure. Because at that point in 2022, he had numerous pending TCPA class actions in which every defendant contended the exact same thing, that you opted in via computer; and that opt-in is a complete defense.

THE COURT: And which of the cases? We've got this case, because you've got the letter in April and then there was

correspondence back and forth between the lawyers about, you know, he did, you know, what happened here. What were the other cases that were pending by June -- cases pending or at least demand letters made where issues were raised by June of 2022 other than your case?

MR. WATSTEIN: And I don't have the exact -- I know that it's in our papers. If you --

THE COURT: I know what's in the papers, and it doesn't say which ones were -- I mean, I can look at the case numbers and see that, you know, '22, probably filed in 2022. I don't know what time period. I don't know how busy their dockets are and those kinds of things, and I didn't do your research for you in that regard. But, you know, you mentioned in a couple of different places -- obviously, there was the one that was filed here in our court in 2021, it seems to me the earliest one, I can tell at least by case years. You highlighted at least six cases that you say involved the Rob -- Robert, the same last name here; but, again, we're talking about an action that was taken in the early summer of 2022.

MR. WATSTEIN: Allegedly, Your Honor. That is the plaintiff's testimony, and there are significant reasons to doubt the plaintiff's testimony, including him contending, Oh, I didn't use a VPN. We know that the lead that was filled out in this case employed a VPN. He testified that he didn't use a VPN. We put in front of him signed TCPA settle- --

THE COURT: Step back. How do you know that the lead -- and this was the TrustedForm certificate of authenticity -- how do you know that a VPN was used in logging on at that time?

MR. WATSTEIN: Sure. So if you -- and I don't know that this is necessarily in the record -- but if you do a reverse lookup, which I just did last night and I've done multiple times, on this IP address, it is a known -- it comes back as a known VPN.

THE COURT: Okay.

MR. WATSTEIN: So, again, these things are very difficult to establish because, you know, these VPN providers are in the business of obscuring information, but it's out there on the internet as a known VPN.

THE COURT: Okay.

MR. WATSTEIN: And I can get you that list, Your Honor, of cases. I just can't -- I don't want to waste your time by trying to rifle through and identify, standing here, the exact cases that were pending at that time, but when I sit down --

THE COURT: Well, clearly, he had another case pending because he signed a settlement agreement about the same time that he was doing some other things.

MR. WATSTEIN: He had several cases pending. I just can't list them all for you standing here.

THE COURT: All right. So, again, let's walk through the intent to deprive component here. So he has the letter -- or his

lawyer, so he's charged with that information saying he submitted an online form. We have consent in this case in April, right?

MR. WATSTEIN: Correct.

THE COURT: And the communications that follow on that, you know: We're closing our file; shouldn't close your file; this, this, that; a fair number of emails back and forth with the lawyers saying, you know, We have it, we have, you know, the IP address; we have the time, all that kind of information. So, obviously, I think at that point in time, that issue was drawn in this case. But what about the other cases? You make a big deal. I mean --

MR. WATSTEIN: Did you say, "What about the other cases?"

THE COURT: Well, I mean, you're saying that there were other cases that were going on between -- at the same time as your case and prior to early summer of 2022 that raised the same issue; is that right?

MR. WATSTEIN: That's correct. There were other cases that I will get you the names of where the defense made the exact express contention as we have in this case and as every defendant has in every one of his cases, which is that, We have an opt-in from you that gives us complete consent. And I can --

THE COURT: I know you've given me a list of the cases. I'm just trying to find out which ones do we know that this issue was presented to him prior to early summer of 2022.

MR. WATSTEIN: Sure. And if I may --

THE COURT: You know what I'm trying to do.

MR. WATSTEIN: I do. And if I may, I actually have a couple of the letters in front of me, so if I may just refer to them. So if you look at --

THE COURT: Exhibit 9?

MR. WATSTEIN: This is Docket Entry 48-1. These documents are attached to the declaration of my colleague, Matthew Keilson, in support of our motion, which is at -- or the brief is at Docket Entry 48.

THE COURT: So this would be in Exhibit 6, starting 63 through 76? Is that what you're looking at?

MR. WATSTEIN: That's exactly correct.

THE COURT: Okay.

MR. WATSTEIN: So just to take a couple examples -- I'm not going to walk through every word of all these letters, but I mean, here's a letter from Bridgewater Health Supplies -- and I'm on page 63 -- it's Bates stamped Reimer 317. This is an April 22, 2022, letter from Bridgewater Health, walking Mr. Reimer through how it obtained the consent in that particular instance, explaining that they never cold call customers, that there was a valid opt-in in this case.

THE COURT: You've got the bridge water one, and it looks like you've got the American Automotive Alliance. It's the document right before that.

MR. WATSTEIN: That is correct.

THE COURT: 312.

MR. WATSTEIN: That's correct, and it's essentially the same: "We determined that we attempted to contact the number in response to an online form submission that took place on July 1, 2021" -- on a different website -- and, Here's the information that we obtained in connection with that.

And there are several of these. But, I mean, these alone put him on notice, express notice, of the defendant's position in the case. I mean, it doesn't take a genius to understand that they're saying I opted in online, and he only had one computer.

There's another letter at Reimer 336 -- I think that letter is dated November 23, 2022 -- but, again, we don't know exactly when he destroyed the computer. We approximated summer of 2022, but we don't know if that's accurate. But, again, it's just more of the same.

THE COURT: All right. So talk to me about remedy.

MR. WATSTEIN: Sure. So in our view, the only remedy that could address the prejudice is dismissal, and I explained a little bit earlier one of the reasons why dismissal is more appropriate in a case like this. Couple of reasons: Number 1, the vast amount of prejudice in this case doesn't come from Mr. Reimer's individual claim; it comes from the class aspect of the case. We're saying we've been deprived of the ability to defend against the individual claim which ends the case, and that has allowed them to unlock the doors to vast class discovery,

total fishing expedition about all these other individuals in a case against a company that sells health insurance involving PHI.

The next step, if this case proceeds after today, is a long series of disputes in front of the Court about how we can possibly be required to turn over all these copious amounts of information when he destroyed the information, the evidence, that we need to end the case now. So we think that dismissal is the only appropriate remedy. And, again, this is not a case where the prejudice to the plaintiff is going to be dire. This is a plaintiff that has made hundreds of thousands of dollars filing these putative class actions, then settling them individually for anywhere between ten and $80,000; pocketing, you know, 30, 40 percent of his income over the past couple of years off this scheme, as we would call it; and the only thing that he loses in this case is not being able to get $10,000 in statutory damages for what he claims was a minor annoyance.

THE COURT: And I sort of short-circuited one of your arguments. I just want to make sure -- the 37(e) analysis for electronically stored information, you said there is another avenue, but the real -- the computer itself, it's only the electronic evidence that's on the computer. You don't care, you know, what color the computer was or anything that has to do with the physical components of the computer; it's only the electronic evidence in the computer. So why isn't this really just a 37(e) analysis?

MR. WATSTEIN: Well, I think a couple of responses to that. It's unclear in the case law when there is -- most of the case law involving ESI involves what is very clearly just ESI. It is a document retention roll-off. It is some metadata, but the device still exists or it was imaged. So, you know, the point of Rule 37 -- and if you read all the comments in the history on Rule 37 -- it was to make sure that we're not giving too strict of punishment in cases where -- it's much easier to delete ESI than it is to delete physical evidence, and so the courts wanted to make sure that there was a uniform rule in place to make sure that we're not doling out too much punishment in a case, for example, where a company has a document retention policy and they accidentally allow emails to roll off, particularly because emails are often available through other sources; there's other custodians; there's always somebody on the other side of the email, right? So that's why I would say, logically, this case doesn't cleanly fit within the rubric of that type of case. It is both a physical evidence and an ESI case; but, again, we think we easily satisfy Rule 37, both prongs of Rule 37.

THE COURT: Okay. I think I understand your position. Thank you.

MR. WATSTEIN: Thank you, Your Honor.

MR. BARRETT: Good morning, and thank you, Your Honor. Once again, I'm John Barrett here for Mr. Reimer. I appreciate

the time to present these arguments on this very serious matter in person. Mr. Reimer is here this morning. These are attacks on his credibility.

THE COURT: They certainly are.

MR. BARRETT: I'm sorry?

THE COURT: They certainly are.

MR. BARRETT: They certainly are, and I will absolutely explain to you why the focus is on the wrong person. The focus should be on the entity that sold the lead to Medigap.

THE COURT: That entity didn't destroy evidence, and the issue in front of me is whether Mr. Reimer, a well-educated Darden Business School graduate, having been involved in multiple pieces of litigation, willfully and voluntarily destroyed a computer in the summer of 2022.

MR. BARRETT: And I think you're absolutely right to focus on what he knew at that time, because what he knows now is very, very different. This is what he knew at that time. And Your Honor was reviewing the letters that are in the file regarding the other cases, and I believe there was a statement made by counsel that they were making in these other cases, that Mr. Reimer had brought the same kinds of allegations, exactly the same allegations.

THE COURT: Right.

MR. BARRETT: Let's look at the letters.

THE COURT: They were online consent forms, okay?

MR. BARRETT: Yes. And let's look at the letters. The first one is Docket Entry 48 --

THE COURT: Let's look at the letter in our case first, the April 19th letter, okay? So let's talk about the specifics of our case, the letter that was sent to him or his counsel on April 19, 2022. And it says, "Your client provided their phone number along with a consent for us to contact your client as part of an online survey. I have attached the certificate we received for your records."

MR. BARRETT: Okay.

THE COURT: So your client, in April of 2022, is charged with that knowledge that Medigap is saying that you consented to this, we have a consent form, and here it is, and you did that online. Okay?

MR. BARRETT: And let's talk about that consent form.

THE COURT: Okay.

MR. BARRETT: The so-called consent form, it's something called a TrustedForm certificate. Our expert has testified in his report, that we've attached, that these things are frequently presented by lead generators, people who are trying to make money from the sale of leads, to establish to the entity that buys the leads -- here, Medigap --

THE COURT: What does that have to do with his destroying evidence?

MR. BARRETT: I just want to look specifically at that

TrustedForm itself. It is of suspect use anyway. But in terms of what it says, what it says is that someone in Dyer, Indiana, where Mr. Reimer does not live, submitted a lead for Medigap coverage. Mr. Reimer knew, of course, that he wasn't in the market for Medigap coverage. He's not 65 or older. Dyer, Indiana: He wasn't in Dyer, Indiana. He did not submit the lead. He did not use his computer. This computer that they're making, you know, the subject of this motion, the testimony was that it was not used at that time, that it was collecting dust. He may have used it once or twice, but when you turn it on, you get a blue screen, if you're able to turn it on at all. So he was not even using this computer at that time.

THE COURT: He testified that for months, he wasn't using a computer --

MR. BARRETT: For months --

THE COURT: -- and that's a little hard to believe, to be honest with you.

MR. BARRETT: There is testimony that he may have used it, but there's no testimony that he did. And he explained why. He's in the business development world. He spends a lot of time on telephone calls. He uses his iPhone a lot, does business work, you know, and was not at that time using his computer, so that is the testimony and I believe it. I would not be standing here, Your Honor, if I didn't believe it.

What this case -- let's talk again about --

THE COURT: All right. So you've got him in hand and you're making arguments now about how the TrustedForm certificate may or may not be something that, you know, people could rely on; but at the time in April of 2022, he knew this was an issue. And you're making arguments now about, Well, you know, it could be scraped, it could be this, it could be that. But the issue is he was making a claim against a party, and he knew that this online survey or input of his information was going to be an issue in this case. So why, then, do you say he doesn't have a duty to preserve the computer, his only computer, that if he was doing something online, that he would have used to do this form? It could have helped him in this case; could have hurt him in this case.

MR. BARRETT: So in hindsight, I think, you know, that duty becomes clear. At that time, I do not believe the duty was clear. There was no -- this letter, Your Honor, came from Medigap legal, okay? It was from their legal department, and it did not --

THE COURT: In response to a letter from his lawyer to Medigap. So, you know, he hired a lawyer, or had a lawyer, correspond to Medigap on his behalf within weeks; and, actually, during this correspondence back and forth, he gets a text message from him. So, I mean, during the entire time, you know, he's got a lawyer on board. I don't know whether it's the same lawyer that represented him in some of these other cases or not, but, I

mean, he's ready to go, sends a demand letter -- I don't have the demand letter, but I assume the April 19th letter was in response to a demand letter -- and then there are all these emails back and forth about, you know, We've got the IP address; we've got the times; we've got this and that. So that issue was so teed up, it's hard for me to understand how you can say there isn't a duty to preserve --

MR. BARRETT: I --

THE COURT: -- on this one letter, not counting the other letters.

MR. BARRETT: Your Honor, I think it would have been very different if there had been a demand for preservation, and there wasn't a demand for preservation. Now, I'm not saying that's the sole basis for the establishment of a duty to preserve. All I can say is, at the time, Mr. Reimer had not dealt with any kind of demand for spoliation or any kind of spoliation issue at all. His computer had never been inspected. These statements are being made that Medigap was, you know, accusing him of fraud. When you read the correspondence between Medigap and his lawyer, it doesn't say you, yourself, you know, committed fraud. It said you, yourself, went online and submitted this form. None of the other entities that he was involved in litigation with say, This is your fault; you did this; you committed fraud. The letter of December 7th, Your Honor, in the other case does not say anything like that. What the letter says is that on July 1st, someone

visited the above-referenced website and completed an opt-in form. It doesn't say that he did. Now --

THE COURT: Let's not -- let's talk about --

MR. BARRETT: Let's --

THE COURT: -- this case before we move on to the other one. "While he may not remember the survey he completed, we have a certificate of authenticity, as we do with all of our potential clients." April 27th email to the lawyer.

MR. BARRETT: Yes.

THE COURT: So, you know, some question is to -- they're saying, You did it; you may not remember it; you may deny it, but, you know, we think you did it.

MR. BARRETT: Your Honor, it sounds like on the duty to preserve issue, that that's a tough issue for us, so if we could focus on the numerous other grounds for denial of this motion, if I may.

THE COURT: All right. So duty to preserve, it's not here, so it's lost, right?

MR. BARRETT: I'm sorry?

THE COURT: If there was a duty to preserve, you acknowledge that it's no longer here, so the information is lost, right?

MR. BARRETT: The information on the computer is gone, yes.

THE COURT: And it wouldn't have been unreasonable for him

to keep the laptop, or computer, while this litigation was pending. This isn't going to cost him anything. He just lets it sit there and collect dust like he said it did for months when he didn't use a computer at all in his very sophisticated business activities.

MR. BARRETT: It would not have cost him money, yes, Your Honor.

THE COURT: So we've got one, two, and three. So what is your argument about can the information be restored; and if so, what have you done in order to get that information?

MR. BARRETT: We are -- we have served numerous subpoenas out to third parties, as counsel mentioned. We believe this lead that was provided that Medigap used to call Mr. Reimer was --

THE COURT: I'm asking about the information on his computer.

MR. BARRETT: Oh, on his computer.

THE COURT: What have you done --

MR. BARRETT: On his computer.

THE COURT: -- in order to find out whether the lost information that he had a duty to preserve, and he destroyed, can be restored?

MR. BARRETT: We have not served any subpoenas in that regard.

THE COURT: What have you done?

MR. BARRETT: We have -- I'm not -- actually, I'm not sure

that we have done -- actually, we have served subpoenas in that regard, Your Honor. We issued a subpoena attempting to get information about who the VPN on the lead form belongs to. That's a Comcast VPN -- I'm sorry -- IP address, the IP address. Whose IP address is that? We have served discovery on that issue. I believe we have a motion pending before Your Honor, or we shortly will, to try to get that information. We want to know who was using that IP address.

THE COURT: This is the only motion that's pending in front of me.

MR. BARRETT: Okay. That issue has been the subject of back-and-forth between counsel, and that will be forthcoming, but --

THE COURT: So you don't have the ability as you stand here today to tell me that you can have any of the information that was on his computer that was destroyed restored?

MR. BARRETT: I cannot tell you that, Your Honor.

THE COURT: So let's move to -- now, there's prejudice to another party. They say that that was a key piece of information; that if they had that information, it could be used to confirm their belief that he was using VPNs at the time frame. So you have some circumstantial evidence relating to the other settlement agreement that was at about the same time, or in May, using a VPN, they say, with his computer; and that, you know, they don't have the ability to look at his computer to confirm

that. So it's lost. Do they have prejudice?

MR. BARRETT: Yes, that is what they're saying. Your Honor, his testimony was that he was using -- not using a VPN, so --

THE COURT: He had used VPNs in the past?

MR. BARRETT: He had, yes.

THE COURT: He didn't say when he stopped; he didn't say why he would have stopped. He says he uses his private browser. He's sophisticated enough to know that he wants to use a private browser, and he probably is sophisticated enough to know that when you're doing things, a VPN also provides some level of security.

MR. BARRETT: Sure. And, Your Honor, he, you know -- if we're charging him with a certain level of sophistication, the question would become, Why not just delete all of the information on his computer and preserve it to avoid these kinds of problems? He didn't do that. He just got rid of it.

THE COURT: It would be even worse.

MR. BARRETT: That would be worse. That would be deliberate, you know, conduct, to destroy evidence.

THE COURT: It would be able to track it deliberately -- I mean, you would be able to get the computer, go back and see what was deleted and what time frame. So throwing away the whole computer doesn't necessarily make it any better, but it may make it a little bit cleaner; wouldn't be able to track information.

MR. BARRETT: That is true. So, Your Honor, we are doing discovery right now --

THE COURT: I'm dealing with a motion right now.

MR. BARRETT: I am, too, to determine whether or not this lead itself was fraudulent. We believe it was fabricated; and if we prove that it was fabricated, Your Honor, if we prove that it was fabricated, his computer would have absolutely no bearing on the issue, because if it was fabricated by a lead generator, it wasn't -- it couldn't have been his computer that was used. We have outstanding subpoenas on that very issue right now, and we will do depositions of the entity that came up with this lead.

THE COURT: How does that alleviate his obligation to preserve discoverable information?

MR. BARRETT: Because the obligation is to preserve relevant information; and if someone else created the lead, fabricated the lead, that information would not be relevant, right? That is -- it would no longer be relevant. It has no relevance, no bearing on this issue at all. We're going to find out about this, Your Honor, within -- very soon, based upon the subpoenas that we have issued. We will take depositions. If Your Honor wants and prefers to again phase things so we aren't --

THE COURT: No. The phasing could very well be that there's no more discovery in this case.

MR. BARRETT: And we think that would be the incorrect

decision, Your Honor, and here's why: Counsel -- there are other claims in this case that are completely unrelated to the computer. Mr. Reimer received telephone calls based on the lead from Medigap. On March 24th, he said, Stop calling me, no more calls, no more calls; and the calls continued, and that is a separate violation of the law. That is contained in Count II of our complaint, which is a violation of the do-not-call procedures that say, When I say stop, the calls have to stop. The calls continued. There were three or four more calls after that point. So those are untouched by the computer issue.

The second claim that is untouched by the computer issue is we have recordings of all of these calls. Medigap records their calls, and they were not complying with the Virginia TCPA provisions, which is Count IV in our complaint regarding identification of the telemarketer. The telemarketer is required, under Virginia's statute, to provide first and last name. That was never done by the telemarketers calling Mr. Reimer. So that claim should not go away because we believe, frankly, we should be entitled to summary judgment on a claim like that. We have recordings, and the disclosures were not made properly. So that's one of the reasons that dismissal is not warranted.

But the second reason that dismissal is not warranted is because we believe that we will prove that the only fraud in this case was committed by the lead generator that got a buck, 25 for

the lead that they sold to Medigap. $1.25 is what Medigap paid for this lead. Lead fabrication is endemic in the telemarketing world. It is the subject of regulation by the Federal Communications Commission right now, and the state attorneys general. This is a significant problem; and I am here today, Your Honor, because I believe that Medigap was calling not only my client, but hundreds and, potentially, thousands of other people based upon a fake lead that was generated by somebody operating a website called American Winner's Circle, which, for a while, doesn't -- you know, doesn't even exist or didn't exist. Now it exists and it directs somewhere else. We need to talk to the people that generated that lead to prove this fraud. If we prove this fraud, the computer is immaterial.

Dismissal is unwarranted, Your Honor, because of these other claims that exist. We need to be able to do discovery on those other claims. Dismissal is unwarranted because we need to, and we are on the verge of, obtaining information relating to the fraud that was committed by Medigap's, essentially, partner in this transaction, the entity that generated the lead. We need to put that on trial. We need to get to the bottom of the evidence, get to the truth; and we're close to that, Your Honor.

Thank you, Your Honor. I have nothing further.

MR. WATSTEIN: Your Honor, if I may respond.

THE COURT: Briefly.

MR. WATSTEIN: So what you just heard was a lot of

speculation and misdirection that doesn't have anything to do with the specific issues in this case. I want to address a few things kind of going backwards.

This idea that, Oh, we have other claims that are unrelated to the computer, this is the first time they've ever said that, and for good reason, because had they said it in their briefing, we would have eviscerated it because it's just not true. Consent is a complete defense. An opt-in is a complete defense because the definition of telephone solicitation or telemarketing, depending on the statute that we're looking at, excludes a call that was requested by the other side. So these, like, specific caller identification requirements of the VTPPA only apply if it's an unsolicited telephone communication; and that makes sense because if you have agreed or requested to receive a call, why would there be a statutory requirement that the entity provide certain hypertechnical identification requirements? So in any event, that's just a complete red herring.

The other thing that I would note is, you know, this consent issue is not the only defense that we have in the case. What you just heard from counsel -- one of the things you just heard from counsel actually is another dispositive defense to our case that was just conceded by the other side's lawyers, and that is both -- so all of the TCPA claims that are asserted are asserted under 227(c), which those are the DNC claims, federal

do-not-call claim, internal do-not-call claim. Those only apply to residential, non-business numbers. Mr. Reimer testified, and his own lawyer just stressed that, his iPhone, the phone number at issue in this case, was his primary business device during this entire time. So in our view --

THE COURT: We're dealing with the spoliation issue.

MR. WATSTEIN: I don't want to get too far afield. And that was my point, is that this was a red herring; it's misdirection; it has nothing to do with spoliation.

I do want to address -- I addressed it briefly when I was first in front of Your Honor, and I want to address it briefly again in response to some of the things that my colleague said -- they claim that they have all these subpoenas out there and they're on the verge of obtaining all this information. We have no reason to believe that they will ever get anything from any of these parties that they have subpoenaed. Nothing's been produced. They don't have a declaration from anyone on the other side. Their own expert that they retained didn't put in a declaration in response to our expert declaration that said they can't get any of this information and it's not going to help them. And, again, all you're hearing is attorney argument: We're going to get to the truth. But, again, I want to stress the most important thing: The information on the computer cannot be replaced by these alternative sources; and the reason for that is you cannot reverse engineer a negative. You can only reverse

engineer a positive. In other words, you could possibly reverse engineer through, for example, Verizon records, some other records, including of the website that the information was submitted on. You could potentially reverse engineer that it was Mr. Reimer sitting in his living room, but what you cannot reverse engineer, because of the use of VPNs and the process, you'll never be able to prove that it wasn't Mr. Reimer. The only way to do that is from the other end of the transaction with the computer, and that's what we're missing. And it's interesting to me that they can sit here with a straight face after the computer has been deleted [*sic*] and say that we should have to go through all of these -- I have to answer questions to my client, Why are we spending all this money in this case? I mean, that's the reality for a defendant in this type of case. It's a putative class action. And that's just fundamentally unfair.

THE COURT: All right. I think I understand all of your arguments.

MR. WATSTEIN: Okay. And that's it, Your Honor. Thank you.

THE COURT: Thank you. I appreciate the arguments I've heard today. I've read all the materials. You-all are aware my role as magistrate judge is one that I can't enter dispositive rulings. What has been asked for in the motion relates to a dispositive ruling. My job in this case is going to be to

prepare a report and recommendation to be sent to the district judge. I will tell you that I will be preparing a report and recommendation. It will not get issued until a week from Monday. If the parties are able to resolve this case before a week from Monday, there won't be a report and recommendation that gets issued. I'm not promising it's going to get out a week from Monday, but that would be my timetable for trying to get that done. So I'm going to give you the opportunity to talk about whether you want to try and get this case resolved between now and then. If not, then I'll issue my report and recommendation. It will be filed in the public record, and the parties have 14 days to serve any objections they that may have, and then District Judge Nachmanoff will take that up at a later time.

I am going to order today that the parties inform all third parties that this matter is under consideration and the discovery is stayed pending my issuance of the report and recommendation and Judge Nachmanoff's ultimate decision. So I want you, to the extent that third parties have been sent out subpoenas and things like that, do tell them that the Court has stayed discovery. Any other discovery that you-all have got going on -- interrogatories, document requests, depositions -- should be stayed, any resolution of this issue. Okay? Any questions?

MR. BARRETT: No, Your Honor.

MR. WATSTEIN: No, Your Honor.

THE COURT: Thank you.

(Whereupon, the proceedings concluded at 11:03 a.m.)

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CERTIFICATE OF REPORTER

I, Diane Salters, hereby certify that the foregoing transcript of proceedings was prepared from an FTR Gold audio recording of proceedings in the above-entitled matter and was produced to the best of my ability. Indiscernible indications in the transcript indicate that the audio captured was not clear enough to attest to its accuracy.

/s/ Diane Salters

Diane Salters, CSR, RCR, RPR
Official Court Reporter